



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

September 23, 2004

Mr. Jesús Toscano, Jr.
Administrative Assistant City Attorney
City of Dallas
1500 Marilla, Room 7DN
Dallas, Texas 75201

OR2004-8141

Dear Mr. Toscano:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 210161.

The City of Dallas (the "city") received a request for (1) correspondence between a named city official and the city's Development Services Department (the "department") that relates to complaints against Dynamic Cable Construction, Inc., ("Dynamic") and Light Links Networks, L.P., ("Light Links") during a certain time period; (2) records pertaining to these complaints and to these companies in general; (3) records pertaining to settlement of the complaint against Dynamic, including the termination of the license agreement at issue; (4) records pertaining to policy, rules, regulations, standards, and procedures associated with Ordinance 924063 or other telecommunication licensing requirements; and (5) records pertaining to a second named individual.

The city received a second request from the same requestor for (1) all requests for "street cut permits" by telecommunications companies during a certain time period and records pertaining to those requests, specifically including "all information relating to those telephone companies where access charges are being collected, have been billed but not paid and all telecommunications companies that hold license agreements with the city;" (2) all "issued/executed" license agreements for telecommunications companies during a certain time period; (3) all "denied" license agreements for telecommunications companies; (4) city council meeting minutes for a certain time period that pertain to license requirements for telecommunications companies, specifically including recommendations, reports, and opinions relating to certain temporary license agreements for non-exclusive use of public rights-of-way; (5) records of complaints and litigation pertaining to telecommunications companies during a certain time period; and (6) correspondence between the city and the

Texas Coalition of Cities for Utility Issues during a certain time period that pertain to the licensing requirements of the city and other governmental bodies.

The city received a third request from the same requestor for (1) "all licenses or permits issued to [Dynamic];" (2) correspondence prepared by current or former city employees pertaining to the complaint against Dynamic and generally regarding a named individual, Dynamic, and Light Links; and (3) documentation indicating that such city employees have requested that the city not release their contact information.

You state, and provide documentation showing, that the city sought and received clarification for all three requests. *See* Gov't Code § 552.222 (providing that a governmental body may ask the requestor to clarify the request if what information is requested is unclear to the governmental body); *see also* Open Records Decision No. 663 at 5 (1999) (discussing requests for clarification). The requestor has clarified her requests to exclude the following types of information: (1) information that is protected from disclosure by "Sec. 283 and HB 1777," including access line counts provided to the Public Utility Commission (the "commission") or the city, information pertaining to municipal access line fee payments received by or due to the city, and any documents created by the city which contain or reference access line counts or municipal access line fee amounts; (2) all "plans" of telecommunications companies that are in the city's possession; and (3) financial information of applicants for franchises, licenses, or right-of-way use permits. Due to this clarification, you inform us that the information you submitted as Exhibit B by correspondence dated June 27, 2004, is no longer responsive to the present requests. Therefore, this ruling does not address the public availability of Exhibit B.¹

You state that some information will be released to the requestor. You claim that the information responsive to the first and second requests is excepted from disclosure under sections 552.101, 552.103, 552.107, and 552.111 of the Government Code.² You claim that the information responsive to the third request is excepted from disclosure under

¹ By correspondence dated July 27, 2004, you inform us that the city notified interested third parties of the first and second requests pursuant to section 552.305 of the Government Code. By correspondence dated August 9, 2004, you state that the city has informed each of the interested third parties that these requests no longer encompass its proprietary information and that "no further action is required on your part."

² We note that you raise section 552.305 of the Government Code as an exception to disclosure. Section 552.305 states in relevant part that "[i]n a case in which information is requested under this chapter and a person's privacy or property interests may be involved . . . a governmental body may decline to release the information *for the purpose of requesting an attorney general decision.*" Gov't Code § 552.305 (emphasis added). Thus, section 552.305 is not an exception to disclosure under the Public Information Act (the "Act"). Rather, section 552.305 is a procedural provision permitting a governmental body to withhold information that may be private while the governmental body is seeking an attorney general's decision under the Act.

section 552.101 of the Government Code.³ We have considered the exceptions you claim and reviewed the submitted information.⁴

You assert that the information submitted as Exhibit D on July 27, 2004, is excepted from disclosure under section 552.103 of the Government Code, which provides as follows:

(a) Information is excepted from [required public disclosure] if it is information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party.

....

(c) Information relating to litigation involving a governmental body or an officer or employee of a governmental body is excepted from disclosure under Subsection (a) only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access to or duplication of the information.

Gov't Code § 552.103(a), (c). A governmental body has the burden of providing relevant facts and documents to show that the section 552.103(a) exception is applicable in a particular situation. The test for meeting this burden is a showing that (1) litigation was pending or reasonably anticipated on the date the governmental body received the request for information, and (2) the information at issue is related to that litigation. *Univ. of Tex. Law Sch. v. Tex. Legal Found.*, 958 S.W.2d 479, 481 (Tex. App.—Austin 1997, no pet.); *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990). A governmental body must meet both prongs of this test for information to be excepted under section 552.103(a).

³ Although you initially raise sections 552.103, 552.107, 552.111, and 552.117 of the Government Code for this information, you have not presented arguments explaining how these exceptions apply to the information responsive to the third request. Therefore, we presume you have withdrawn your claims under these exceptions. See Gov't Code §§ 552.301, .302.

⁴ We assume that the "representative samples" of records submitted to this office are truly representative of the requested records as a whole. See Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

You have submitted copies of court documents which indicate that the city is currently involved in litigation relating to damage caused by a water main break.⁵ Based on our review of your arguments and the submitted information, we conclude that the city was involved in pending litigation on the date it received the present request. Further, we conclude that Exhibit D is related to the pending litigation. Therefore, the city may withhold Exhibit D pursuant to section 552.103.

We note, however, that once information has been obtained by all parties to the litigation through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349 (1982), 320 (1982). Thus, information that has either been obtained from or provided to the opposing party in the pending lawsuit is not excepted from disclosure under section 552.103(a), and it must be disclosed. Further, the applicability of section 552.103(a) ends once the litigation has been concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

You also assert that the information submitted as Exhibit F on July 27, 2004, is excepted from disclosure under section 552.107 of the Government Code. Section 552.107(1) excepts from disclosure information protected by the attorney-client privilege. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made “for the purpose of facilitating the rendition of professional legal services” to the client governmental body.⁶ TEX. R. EVID. 503(b)(1). Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives.⁷ TEX. R.

⁵You have provided court documents from the following pending cases: *Southwest Properties Group, Inc. v. Dynamic Cable Construction Co., Inc. v. City of Dallas*, Cause No. 00-7671-A, in the 14th District Court, Dallas County, Texas; and *United States v. Dynamic Cable Construction Co., Inc.*, Civil Action No. 3:03-CV-01981-R, in the United States District Court for the Northern District of Texas, Dallas Division.

⁶The privilege does not apply when an attorney or representative is acting in a capacity other than that of providing or facilitating professional legal services to the client governmental body. *In re Texas Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in a capacity other than that of attorney). Because government attorneys often act in capacities other than that of professional legal counsel, including as administrators, investigators, or managers, the mere fact that a communication involves an attorney for the government does not demonstrate this element.

⁷Specifically, the privilege applies only to confidential communications between the client or a representative of the client and the client’s lawyer or a representative of the lawyer; between the lawyer and the lawyer’s representative; by the client or a representative of the client, or the client’s lawyer or a representative of the lawyer, to a lawyer or representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein; between representatives of the client or between the client and a representative of the client; or among lawyers and their representatives representing the same client. *See* TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E); *see also id.* 503(a)(2), (a)(4) (defining “representative of the client,”

EVID. 503(b)(1)(A), (B), (C), (D), (E). Thus, a governmental body seeking to establish that a communication is protected by the attorney-client privilege must inform this office of the identity and capacity of each individual involved in the communication. Finally, the attorney-client privilege applies only to a communication that is confidential. *Id.* 503(b)(1). A confidential communication is a communication that was “not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.” *Id.* 503(a)(5).

Whether a communication meets the definition of a confidential communication depends on the intent of the parties involved at the time the information was communicated. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no writ). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) of the Government Code generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

You state that Exhibit F consists of “a confidential communication made by an attorney to her client for the purpose of rendering professional legal services to her client.” Based on your representations and our review of Exhibit F, we agree that this information constitutes a communication exchanged between privileged parties in furtherance of the rendition of legal services to a client. Accordingly, we conclude that the city may withhold Exhibit F pursuant to section 552.107(1).

Next, you assert that the information submitted as Exhibit G on July 27, 2004, is excepted from disclosure under section 552.111 of the Government Code. Section 552.111 excepts from disclosure “an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency.” This section encompasses the attorney work product privilege found in Rule 192.5 of the Texas Rules of Civil Procedure. *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 360 (Tex. 2000); Open Records Decision No. 677 at 4-8 (2002). Rule 192.5 defines work product as:

(1) material prepared or mental impressions developed in anticipation of litigation or for trial by or for a party or a party’s representatives, including the party’s attorneys, consultants, sureties, indemnitors, insurers, employees, or agents; or

(2) a communication made in anticipation of litigation or for trial between a party and the party’s representatives or among a party’s representatives,

“representative of the lawyer”).

including the party's attorneys, consultants, sureties, indemnitors, insurers, employees or agents.

TEX. R. CIV. P. 192.5(a). A governmental body seeking to withhold information under this exception bears the burden of demonstrating that the information was created or developed for trial or in anticipation of litigation by or for a party or a party's representative. TEX. R. CIV. P. 192.5; Open Records Decision No. 677 at 6-8 (2002). In order for this office to conclude that the information was made or developed in anticipation of litigation, we must be satisfied that 1) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue; and 2) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and created or obtained the information for the purpose of preparing for such litigation. *Nat'l Tank Co. v. Brotherton*, 851 S.W.2d 193, 207 (Tex. 1993). A "substantial chance" of litigation does not mean a statistical probability, but rather "that litigation is more than merely an abstract possibility or unwarranted fear." *Id.* at 204. Information that meets the work product test is confidential under Rule 192.5 provided the information does not fall within the purview of the exceptions to the privilege enumerated in rule 192.5(c). *Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ).

You state, and provide documentation indicating, that Exhibit G "was prepared in anticipation of litigation and for trial" in *City of Dallas v. Metropolitan Fiber Systems of Dallas, Inc. and Brooks Fiber Communications of Texas, Inc.*, Cause No. DV98-06162-D, in the 95th District Court, Dallas County, Texas. Based on our review of your representations and the submitted information, we find that the city objectively and subjectively anticipated litigation and that Exhibit G reveals the attorney's thought processes regarding the anticipated litigation. Thus, Exhibit G may be withheld under section 552.111 as attorney work product.

Finally, we note that a portion of the information submitted as Exhibit B on August 10, 2004, is subject to section 552.136 of the Government Code, which provides in relevant part:

(a) In this section, "access device" means a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to:

- (1) obtain money, goods, services, or another thing of value;
or
- (2) initiate a transfer of funds other than a transfer originated solely by paper instrument.

(b) Notwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.

Gov't Code § 552.136. The city must withhold the account number information that you have marked in Exhibit B pursuant to section 552.136.⁸

In summary, the city may withhold Exhibit D pursuant to section 552.103. The city may withhold Exhibit F pursuant to section 552.107(1). The city may withhold Exhibit G pursuant to section 552.111 as attorney work product. The city must withhold the marked information in Exhibit B under section 552.136. The remaining information submitted as Exhibit B on August 10, 2004, must be released to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

⁸As we are able to make this determination, we do not address your argument under section 552.101 of the Government Code for this information.

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Amy D. Peterson
Assistant Attorney General
Open Records Division

ADP/krl

Ref: ID# 210161

Enc. Submitted documents

c: Ms. Brenda Jenkins
Dynamic Cable Construction Co.
591 VZ CR 4823
Ben Wheeler, Texas 75754-5399
(w/o enclosures)

Ms. Brenda Jenkins
1413 Bay Hill Drive
Austin, Texas 78746
(w/o enclosures)

Sprint Telecommunications, Inc.
Attn: Monica M. Barone
6450 Sprint Parkway
Overland Park, Kansas 66251
(w/o enclosures)